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1.0 Introduction

1.1 HB 397 Mandate and Governor Martz' Charge to the Consensus Council

The 2001 Montana Legislature passed House Bill 397, "An Act Establishing the Clark Fork River Basin Task Force…." The bill, signed into law by Governor Martz, requires the Governor to "[D]esignate an appropriate entity to convene and coordinate a Clark Fork River basin task force to prepare a water management plan for the Clark Fork River basin pursuant to 85-1-203" of the Montana Code Annotated (MCA). See Appendix A for the full text of HB 397.

The task force and water management plan were proposed in response to concerns that Avista Corporation, which owns and operates two dams on the lower Clark Fork River, might make a call on upstream water rights junior to its 1951, 1959, and 1976 hydropower water rights. Such a call would disrupt junior water uses, particularly in the Flathead River basin.

HB 397 also mandated that the entity designated by the Governor shall:

(a) Identify the individuals and organizations, public, tribal, and private, that are interested in or affected by water management in the Clark Fork River basin;
(b) Provide advice and assistance in selecting representatives to serve on the task force;
(c) Develop, in consultation with the task force, appropriate opportunities for public participation in the development of a water management plan; and
(d) Ensure that all watersheds and viewpoints within the basin are adequately represented on the task force, including a representation from the following:
  (i) the reach of the Clark Fork River in Montana below its confluence with the Flathead River;
  (ii) the Flathead River basin, including Flathead Lake, from Flathead Lake to the confluence of the Flathead River and the Clark Fork River. At least one representative from this basin must be a representative of the Confederated Salish and Kootenai tribal government.
  (iii) the Flathead River basin upstream from Flathead Lake;
  (iv) the reach of the Clark Fork River basin between the Blackfoot River and the Flathead River;
  (v) the Bitterroot River basin as defined in 85-2-344, MCA; and
  (vi) the Upper Clark Fork River basin as defined in 85-2-335, MCA.

In response to this legislation, on July 2, 2001, Governor Martz asked the Montana Consensus Council to "take the lead in organizing, convening, and facilitating a task

force to develop a water management plan for the Clark Fork River basin in Montana."

1.2 The Role of the Consensus Council

The Montana Consensus Council is attached to the Office of the Governor for administrative purposes. Its mission is to promote inclusive, informed, and deliberative processes to help people develop effective public policy on natural resources and other issues important to Montanans. The Consensus Council is impartial and non-partisan; it is not an advocate for any particular interest or outcome.

The Consensus Council is an impartial servant of all participants in this process. We are committed to fairly and accurately assessing the situation and designing an effective process to meet the needs of all of the people and organizations interested in water management in the Clark Fork River basin.

1.3 Purpose of this Situation Assessment

When the Consensus Council is asked to help a diverse group of people to address an issue, we first conduct a situation assessment. We visit with as many people as is practical and appropriate to learn about the issues involved, identify the people concerned about them, understand their interests and concerns, and determine how the issues are being addressed and how they are likely to be addressed in the future. In this case, we visited with people who expressed an interest in the development of a water management plan for the Clark Fork River basin as set out in HB 397. The results of these interviews (and responses to an initial questionnaire distributed by the Consensus Council) are summarized in this report. Based on the interviews, we also offer recommendations on task force organization and operation, and several suggested next steps. Think of this report not as an exhaustive study, but as a starting place for further conversation.

1.4 Funding

In passing HB 397, the Legislature provided funding to support its implementation beginning in Fiscal Year 2003, which begins on July 1, 2002. By that date, the Legislature estimated that the statutory upper limit on the Resource Indemnity Trust would be reached, and a portion of the funds flowing into the trust could be diverted to support the preparation of a water management plan. In her July 2, 2001, letter, Governor Martz encouraged the Consensus Council "to seek a mix of public and private funding sources, including any resources that the Consensus Council might be able to contribute."

Beginning in FY 2003, $120,000 is available to be used for facilitation and process coordination, technical services, and travel expenses for task force participants. Funds remaining after the biennium can be carried over as the work continues.

The Consensus Council used three sources of funds to conduct, compile, and publish this assessment report. One source was a contract with the Montana Department of Natural Resources and Conservation (DNRC), the second was the Consensus Council general fund allocation, and the third was grant monies from the William and Flora Hewlett Foundation.

2.0 Assessment Methodology

2.1 Press Release

To begin the assessment process, the Consensus Council mailed a press release announcing the interview process and soliciting the participation of people and organizations potentially interested in water management in the Clark Fork River basin. The press release was mailed to an initial mailing list generated by DNRC and local watershed councils. The list included more

than 130 individuals, organizations, and newspapers within the basin.

2.2 Questionnaire and Interviews

As a first step, the Consensus Council mailed a questionnaire to everyone on the list. The questionnaire include nine questions designed to reveal the interests and concerns about water management in the basin and peoples' interest in participating in a Clark Fork River basin task force.

- What are your interests and concerns with respect to water rights, water use, and water management in the basin?
- If water use and water management in the basin continue on their present course, what is the most likely outcome? And how acceptable is that outcome to you?
- Is there a need for a basin-wide watershed management plan? How could such a plan add value to existing water management efforts in the basin?
- What would a successful plan look like to you?
- What issues should be addressed in a basin-wide watershed management plan?
- Who should be involved in helping develop a basin-wide water management plan? More specifically, what viewpoints and interests should be represented on the task force?
- Would you be interested in participating in the development of a basin management plan? If so, how?
- Do you have any suggestions on how we should proceed in creating the task force and developing a basin-wide water management plan?
- Do you have any other comments or suggestions?

2.3 Summary of Who Responded

We conducted interviews with about 30 people, using the same questions from the questionnaire. The number of face-to-face interviews was limited by funding availability, although we did add potential interviewees to the initial list when they were identified during interviews. We received 22 completed questionnaires (and also two written responses as addenda to two of the interviews). Respondents to the interviews and questionnaires represented some but not all of the interests likely to be affected by water management in the Clark Fork basin. The interests we heard from included: agriculture, chambers of commerce, conservation districts, counties, the Montana Department of Natural Resources and Conservation, environmental organizations, fish and wildlife agencies, hydrologists, hydropower producers, irrigation districts, property owners, the Confederate Salish and Kootenai Tribes, sportsperson groups, water rights holders, and watershed groups. See Appendix B for a list of people and organizations we contacted for interviews (not all of whom responded).

3.0 The Existing Water Management Situation

3.1 Hydrology

In terms of water collected and total discharge from the state, the Clark Fork of the Columbia is Montana's largest river. Between 1990 and 2000, the mean annual discharge of the Clark Fork River at the Montana-Idaho border was 20,744 cubic feet per second (cfs).

About 60 percent of this flow (12,505 cfs) is contributed by the Flathead River, as measured near Perma, Montana. About 94 percent (11,745 cfs) of the Flathead contribution is provided by the Flathead watershed above and including Flathead Lake.

About 33 percent (6,910 cfs) of the Clark Fork basin's mean annual discharge is contributed by the Clark Fork itself, measured just below its confluence with the St. Regis

Table 3.1
Contributions to Mean Annual Discharge of the Clark Fork River (Source: DNRC)

Watershed	Drainage Area (square miles)	Mean Annual Discharge 1990 – 2000 (cfs)	Percent of Total Clark Fork Mean Annual Discharge at Montana-Idaho Border
Upper Clark Fork at Turah	3,641	1,308	6.3
Blackfoot River	2,290	1,546	7.5
Bitterroot River	2,814	2,261	10.9
Flathead River	8,795	12,505	60.3
Other Clark Fork inflow*		3,124	15.0
Total Clark Fork Basin	21,833	20,744	100

*Estimated contribution of watersheds, other than those listed above, between gauges (from Turah to below the mouth of the St. Regis River, from below the mouth of the St. Regis River to the mouth of the Flathead, and from the mouth of the Flathead to the Montana-Idaho border).

River (and about 20 miles above the mouth of the Flathead River). Principal sub-watersheds above the St. Regis River contribute significant flows, as shown in Table 3.1. The remaining 7 percent of the Clark Fork's total mean annual discharge comes from inflow in reaches between the gauges given here. (See Appendix C for a map of the Clark Fork River Basin.)

3.2 Water Rights

With the passage of the Montana Water Use Act in 1973, the state established a single and exclusive permitting system governing new appropriations of water in Montana. Prior to passage of the act, a person could create a right to use water either by simply diverting and using the water or by filing notices of appropriation in a local county courthouse.

3.2.1 Water Rights Adjudication

The 1973 Montana Water Use Act also initiated the ongoing statewide general stream adjudication process of pre-1973 water rights. This process was further expedited under Senate Bill 76 in 1979. When completed, the adjudication will document and quantify all pre-1973 surface water rights and significant existing groundwater developments.

Montana's centralized database of water rights is divided into four major hydrologic basins, one of which is the Clark Fork River basin. In turn, the Clark Fork is comprised of 12 major sub-basins, including:

- Upper Clark Fork
- Flint Creek
- Rock Creek
- Middle Clark Fork
- Swan River
- Middle Fork Flathead
- South Fork Flathead
- Lower Clark Fork
- Bitterroot River
- Big Blackfoot River
- Flathead River to and including Flathead Lake
- Flathead River below Flathead Lake

The first eight basins in this list have completed the first stage of the adjudication process. In the first stage, DNRC reviews all basin claims, and the Montana Water Court issues either a preliminary decree, or a temporary preliminary decree for basins with federal reserved water rights. After all parties to the decree have an opportunity to object to the rights in the preliminary or temporary preliminary decree, and all federal reserved rights are added, the Water Court issues a

final decree. Water rights holders are then granted a Certificate of Water Right. None of the 12 Clark Fork basins have final decrees.

The remaining four basins are at different stages in the adjudication process. The Bitterroot River basin is currently developing its temporary preliminary decree. The Flathead River to and including Flathead Lake, the Flathead River below Flathead Lake, and Big Blackfoot River basins have not yet initiated the first stage of the adjudication process.

3.2.2 Avista Water Rights

The hydropower water rights held by Avista Corporation (formerly Washington Water Power Corporation) for its dams on the lower Clark Fork River could significantly affect water use throughout the basin. Avista owns two large dams, Noxon Rapids and Cabinet Gorge, on the Clark Fork River near the Montana-Idaho border. Although relatively recent, the water rights associated with these dams are significant because of their size and location. About 30 percent of water rights in the Clark Fork River basin are junior to Avista's rights. Continued development of new basin rights may increase the likelihood that Avista will act to enforce its rights.

Avista installed turbines at the Noxon Rapids Dam in 1951, 1959, and 1976. Water rights associated with the turbines are:

- 1951 – 35,000 cfs with a priority date of February 20, 1951
- 1959 – 5,400 cfs with a priority date of April 3, 1959
- 1976 – 15,000 cfs with a priority date of November 19, 1974

The 1951 and 1959 rights were confirmed in an August 27, 1986, decree issued by Water Court Judge Holter. Avista obtained the 1976 rights through the Montana Water Use Act's water right permitting process and the associated public notice and administrative review.

According to a report prepared by the State of Montana and Avista, Noxon Rapids Dam has the turbine capacity and water rights to allow it to operate at a maximum river flow of 50,000 cfs, which amounts to all of the river most of the time. Avista can utilize the entire flow of the Clark Fork River during the maximum spring flows seven out of every ten years. This means that in seven out of every ten years, Avista would have the right to call on basin water users with junior water rights.

3.2.3 PP&L Water Rights

PP&L Montana operates the Thompson Falls hydropower plant, which was a run of the river plant until 1993. That year, the company was issued a new permit for 12,300.00 cfs up to 8,904,186 acre feet. This increased PP&L's ability to take advantage of a much larger range of available flow, which may become a factor in managing water use in the basin.

3.2.4 Beneficial Uses

Table 3.2.3 (on page 6) shows the number of water rights in the Clark Fork River basin as of June 2, 1998, categorized by beneficial use and by priority date in relation to the priority dates of Avista's water rights.

3.2.5 Basin Closures

A basin closure defines conditions for limiting or prohibiting additional appropriations of water in a basin. Only under such a closure can the state reject and return an application for a new water permit without establishing an individual decision record for each case. Basin closures are established through one of three mechanisms: a petition and hearing to close a basin by administrative rule; legislative action; or a negotiated compact that identifies, quantifies, and administers federal reserved water rights.

Table 3.2.3
Uses of Surface Water in the Clark Fork River Basin as of June 2, 1998 (Source: DNRC)

Use Category	Number of Water Rights by Priority Date			
	All Years	Pre 2/20/51	2/21/51 to 11/19/74	Post 11/04/74
Fish & Wildlife	978	439	217	322
Irrigation	12,914	9,781	1,777	1,356
Municipal	4,309	1,791	1,705	1,356
Power Generation	130	81	13	36
Stock Water	7,001	5,733	813	455
Other Uses	942	644	155	143
All Uses Total	**26,274**	**18,469**	**4,680**	**3,125**

Fourteen areas in the Clark Fork basin have been closed to further appropriations. They include:

- The temporary Bitterroot basin closure passed by the legislature in 1991 (85-2-344, MCA).
- The permanent closure of the upper Clark Fork River basin, defined as the river and all tributaries including the Big Blackfoot River above Milltown Dan, passed by the Legislature in 1995 (see 85-2-335 through 85-2-337, MCA).
- The compact closure of the National Park Service affecting Glacier National Park.
- The seven small administrative rule closures of:
  - Grant Creek, a tributary of the Clark Fork River.
  - Houle Creek, a tributary of the Clark Fork River.
  - Sixmile Creek, a tributary of the Clark Fork River.
  - Sharrott Creek, a tributary of the Bitterroot River.
  - Willow Creek, a tributary of the Bitterroot River.
  - Walker Creek, a tributary of the Whitefish River.
  - Truman Creek, a tributary to Ashley Creek in the Flathead.
- The four small controlled groundwater areas of:
  - Hayes Creek watershed groundwater area near Missoula.
  - Larson Creek watershed groundwater area near Stevensville.
  - Warm Springs pond groundwater area near Deer Lodge.
  - Rocker groundwater area near Butte.

3.3 Ongoing Water Management Initiatives

Several water planning and management initiatives are underway throughout the Clark Fork River basin. Some are citizen driven and are being conducted by local watershed groups. Others are state and/or federal initiatives.

3.3.1 Existing Watershed Groups

More than 20 local watershed groups are active in portions of the Clark Fork River basin, including:

Ashley Creek Watershed Group
Bitterroot Water Forum
Blackfoot Challenge
Bull River Watershed Council
Elk Creek Watershed Council
Flint Creek Watershed Group
Haskell Basin Watershed Group

Mineral County Watershed Group
Mount Creek Watershed Group
Prospect Creek Watershed Council
Rock Creek Watershed Council
Rock Creek Trust
Tri-State Water Quality Council
Trout Creek-Little Trout Creek Watershed Council
Upper Clark Fork River Basin Steering Committee
White Pine Creek Watershed Council

The activities of these groups are diverse, though most focus on issues such as watershed restoration and water quality concerns, water quality plans (TMDLs), and fisheries protection and enhancement.

3.3.2 State Sponsored Initiatives

As with the citizen-initiated watershed efforts, a wide range of watershed activities are sponsored by various Montana state agencies. A few of these include:

- Instream Flow Leasing Program of MFWP.
- Flathead Groundwater Characterization Study soon to be completed by the Montana Bureau of Mines and Geology.
- The Flathead Basin Commission.
- Natural Resource Damage Program. A fund established under the ARCO settlement provides grant support for restoration projects in the Clark Fork basin.

3.3.3 Federally Sponsored Initiatives

Significant federally sponsored initiatives include:

- Bull Trout Recovery Program of the U.S. Fish and Wildlife Service (USFWS).
- Partners for Fish and Wildlife Program of the USFWS provides funding and technical assistance to private landowners interested in fish and wildlife habitat projects on their land.
- Sub-basin plans under development pursuant to the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power Planning Council and funded by the Bonneville Power Administration.
- Wetland Preserve Program of the USDA Natural Resources Conservation Service provides landowners with financial incentives to restore, create, and enhance wetlands.

3.3.4 Recent Studies

A significant amount of attention has been given to water quantity and quality issues in the Clark Fork River basin. Federal, state, and non-governmental organizations have studied the basin's hydrology, water use, groundwater supplies and return flows, hydropower production, irrigation, and water allocation. Appendix E lists recent water-related studies in the Clark Fork River basin.

4.0 Findings

Approximately 40 to 50 people responded to our questionnaires or participated in interviews, including representatives of agricultural interests, chambers of commerce, conservation districts, counties, DNRC, environmental organizations, fish and wildlife agencies, hydrologists, Avista Corporation, irrigation districts, property owners, The Confederated Salish and Kootenai Tribes, sportsperson groups, water rights holders, and watershed groups.

4.1 Basin Water Issues

Respondents said that water users in the Clark Fork basin face several water-related issues, including:

- Superfund Cleanup – The Clark Fork River (including the former Anaconda Company mining and smelting works in

Butte and Anaconda and the Milltown Reservoir) constitutes the largest federal Superfund site in the nation. Cleanup in the Butte and Anaconda areas is underway.

- Milltown Dam and Reservoir – Milltown Reservoir currently hold several million cubic yards of sediment contaminated with heavy metals, carried by the Clark Fork River from the former Anaconda Company mining and smelting operations upstream. The County and City of Missoula, the Montana Department of Fish, Wildlife and Parks (MFWP), and environmental organizations are advocating removal of the dam and the contaminated sediments.
- Natural Resource Damage (NRD) Lawsuit – The State of Montana has sued ARCO, the successor to the Anaconda Company, for $700 million to compensate the state for damages caused by Anaconda Company activities to Montana natural resources. A partial settlement of claims in this litigation has made available $200 million for natural resource restoration projects in the Butte and Anaconda areas. Claims related to the mainstem of the Clark Fork River above Milltown Dam have not been settled. The state created the Upper Clark Fork River Basin Remediation and Restoration Education Advisory Council to advise the Governor on the expenditure of funds obtained through the NRD lawsuit.
- Water Compacts – The State of Montana has a program for negotiating water compacts with tribal governments and federal agencies. Compacts with the Confederated Salish and Kootenai Tribes and with the U.S. Forest Service have not been completed. The tribes are asserting jurisdiction over all water arising from or flowing through the reservation, including groundwater. Litigation between the state and the tribes is ongoing over water rights permitting on the reservation.
- Avista Water Rights – Avista Corporation recently received new licenses from the Federal Energy Regulatory Commission (FERC) for its two hydroelectric dams on the Clark Fork River. During the relicensing process, DNRC raised concerns about the large number of water users in the Clark fork Basin who have water rights with a priority date junior to Avista's rights (see section 3.2.2). Although the State and Avista negotiated an agreement that would have increased the security of these junior rights, FERC declined to make the agreement a condition of Avista's hydropower licenses, and the State and Avista allowed the agreement to lapse.
- Drought Planning – The last three years of drought have stimulated drought planning activities in at least one area of the Clark Fork basin, the Big Blackfoot River sub-basin.
- Dam and Reservoir Operation – The operation of basin dams and reservoirs, including Kerr Dam and Flathead Lake and Georgetown Dam and Lake, have provoked controversy and litigation.
- Water Infrastructure – Much of the basin water storage and delivery infrastructure, including dams, siphons, and irrigation ditch systems, are at least 50 years old and in need of repair. In most cases, the users of these facilities are unable to fund the needed repairs on their own.
- Water Quality – The state has identified about 300 stream segments of 250 water bodies in the Clark Fork basin that either are not meeting water quality standards or are at risk of non-compliance. The Montana Department of Environmental Quality (DEQ) must develop water management plans for these streams by 2007.
- Threatened and Endangered Species – The bull trout, a fish native to Montana, and Columbia Basin salmon stocks have been added to the federal list of threatened or endangered species.

Recovery plans addressing fish habitat and fish harvest are being developed.

- Stream Dewatering – The Confederated Salish and Kootenai Tribes, MFWP, and sportsperson organizations such as Montana Trout Unlimited have sought to reduce the dewatering of basin streams by purchasing and leasing water to remain instream, and through dam license conditions.

4.2 Support for the Task Force and Clark Fork River Basin Water Management Plan

Of the people we heard from, more than three-quarters said that there is a need for the task force and basin-wide water management plan. Only one person was opposed, and six were unsure of the benefit of doing so.

4.3 Reasons for Supporting the Task Force and Water Management Plan

Generally, people who support creation of the task force and development of the water management plan gave one or more of the following four reasons for doing so:

- Over appropriation – The Clark Fork basin is now or will be over-appropriated, that is, more water rights exist than water to fill them. A task force and a plan could keep this situation from getting worse.
- Protection – A task force and plan could protect the interests of existing water rights holders, protect basin water users against interests downstream of Montana, protect agriculture, protect existing property rights, protect against turf wars among users, and/or protect against preemption of existing watershed planning efforts.
- Coordination – A task force and plan could provide coordination among upper, middle, and lower basin water user groups and water management agencies, among water rights holders, and among stakeholders. They could also coordinate water allocations arising from water rights adjudication and other non-adjudication constraints such as reservoir rule curves, lake level and fish flow constraints, water quality regulation, etc.
- Opportunity – A task force and plan could provide the opportunity to increase water use efficiency, increase instream flows, protect native and endangered fish, promote and maintain water quality, provide a means for growth, and/or determine priorities for water use.

Those doubtful of benefits were skeptical about the authority to implement the plan and/or that such a plan would be practical for an area as large as the entire basin. One questionnaire respondent said that the plan would be useful only if it had the force of law and fit into the existing legal framework. Another opposed participation in the task force as a threat to existing water rights.

4.4 Issues That Should Be Addressed in the Water Management Plan

In identifying issues, respondents envision the scope for the water management plan differently. Some see a broad scope and would have it address "all issues." Others see the scope as narrow, and would focus only on issues common throughout the basin, such as the constraints that Avista's mainstem hydropower rights impose on upstream water use. Some see the plan as addressing only or primarily water quantity issues, while others would include water quality, growth management, land use (floodplain and streambank management), and economic development. Some recognize in the plan an opportunity to understand how much water is available in the basin, how it is used, and how it will be used in the future. Others would identify who has the current right to use water, in what amounts, and with what priority. Some would consider the existing water management system, including whether

additional water rights should be issued, how water rights are and should be enforced, how to facilitate the transfer of existing water rights to beneficial instream uses, and whether different priorities should be assigned among the beneficial uses. Other specific issues mentioned by people who responded by questionnaire or interview include:

- The legal validity of Avista's hydropower water rights.
- Opportunities for increasing the efficiency of basin water use.
- Increasing instream flows for fish and wildlife.
- Understanding the intent, philosophy, and substance of the Confederated Salish and Kootenai Tribes' water compact proposal.
- Dissolved oxygen levels and heavy metal pollution.
- Drought and high water management.
- Dam and reservoir operations.
- Installation of stream flow measurement devices.
- Water project financing.
- The authority to implement a basin water management plan.
- Weed management.
- Specific water uses, including irrigation, recreation, electricity production, and domestic and industrial water supplies.
- The effect of flow changes on phosphorus and nitrogen loading and algae growth in the river.
- Non-point source pollution.
- Total Maximum Daily Load plans for individual drainages.
- Identification of conflicting laws and needed law changes.
- Natural disturbances such as fire.
- The economic structure of the basin and its impact on water quality and quantity.
- Thermal pollution.
- Endangered and threatened species.
- Protection of important native fish stocks.
- Coordination of growth, local planning, and "area growth planning" by cities, towns, and counties.

4.5 People Who Should be Involved and Who are Interested in Participating in Plan Development

Respondents generally agreed that a broad representation of the basin's water users should be involved in the preparation of the water management plan. Some proposed that a majority of the participants should be water users, while others argued that representation must be balanced across broader interests. Some advocated excluding environmentalists because, they said, they would advocate for more laws and regulations and would attempt to derail the management planning efforts. Some would exclude agency representatives except as technical advisors. Others would exclude legislators because they lack a specific water interest or because they would act as decision makers in the legislature. The following interests were all suggested for inclusion by one or more people:

- Agriculture
- Chambers of commerce
- Columbia Falls Aluminum
- Conservation districts
- Counties
- DEQ
- Environmental organizations
- Federal land managers
- Fish and wildlife agencies
- Future water users represented by DNRC
- Home builders
- Hydrologists
- Hydropower
- Irrigation districts
- Municipalities
- Planning and economic development officials
- Property owners
- Recreation-based businesses
- Real estate businesses
- Confederated Salish and Kootenai Tribes
- Sportsperson groups
- Timber interests
- Tourism interests
- Water rights holders

- Watershed groups
- Well drillers

Most of the people we heard from were willing to participate in the development of the plan as active members or advisors. Some preferred merely to monitor the task force efforts to develop the plan. **Of the interests and organizations that people suggested should be involved, the following did not respond to the questionnaire or our request for an interview:**

- Columbia Falls Aluminum
- DEQ
- Federal land managers
- Home builders
- Cities and towns
- Planning and economic development officials
- Recreation-based businesses
- Real estate businesses
- Timber interests
- Tourism interests
- Well drillers

4.6 Suggestions for How to Proceed

Most of the people we heard from offered suggestions as to how the Consensus Council should proceed with creating a task force and developing the plan. Suggestions included:

4.6.1 Shaping the Process

- The number of people on the task force should be kept small, on the order of 15, to facilitate its function.
- All interests must be represented and should participate.
- If the plan is to be put in place, the task force should include stakeholders, as well as representatives of the existing watershed groups. If the plan does not take into consideration what has been done by watershed groups, the plan could unintentionally damage the positive work already accomplished.
- Proceed carefully.
- Conduct a conference with resource people and interested members of the public to discuss the situation and create an understanding of the task at hand.
- Convene educational/informational meetings (something like Water Management 101) to see if we can get everyone on board and on the same page.
- Compile the results of this questionnaire and send the results to those who are willing to work on a plan. Set a meeting date with the goal of crafting an outline of a plan and assigning sections of the plan to the task force members to write and bring back to the whole group for review.
- Call a meeting and request representative from various points of view.
- The plan should incorporate existing information. It should also make use of smaller sub-basin groups to address sub-basin specific issues.
- Define what is included in the basin. Start by inviting all of the existing watershed groups, conservation districts, city and county governments, DEQ, MFWP, DNRC, and USFS to each send a representative to an initial meeting. Then have that group think about additional people to invite and also think about a structure for the group. Perhaps create an executive committee for the whole basin, made up of representatives from each eight-digit hydrologic unit code (HUC) sized watershed, and with those eight-digit HUC sized watershed councils made up of representatives from still smaller local groups.
- Appoint a core group of proactive people from existing agencies and interests. Give them a very specific time frame, charter, and the support tools (facilitators, GIS support, funds, etc.) to get the job done. Allow them to determine the path and who else to include. Then provide assurance that the product(s) will be implemented through a regulatory or legislative framework.

- A task force for the basin should be a repository for information and resources, and should allow existing groups to function as they are.
- Scope issues and stakeholders before convening the task force. Invite interested parties to participate, and use a peer selection process to choose those who sit at the table during plan development.

4.6.2 Substantive Issues

- Prepare a review and comparison of existing water management plans and activities, specifically those efforts in the Bitterroot, Blackfoot, and Upper Clark Fork river basins. A common element in these areas is a basin closure.
- Water rights are a big issues that cannot be addressed by the task force.
- Other sub-basins are ahead of the Flathead in water management planning because the adjudication process hasn't happened here. A closure to surface water rights adopted by other sub-basins is not appropriate here.

5.0 Consensus Council Recommendations on How to Proceed

Based on the findings, limited number of respondents, and existing funding, the Consensus Council recommends a two-pronged approach for moving forward. The first is to convene a series of educational forums, and the second is to help interested parties in the Flathead basin above Flathead Lake to form a watershed council.

5.1 Convene a Series of Educational Forums

We recommend convening an educational forum rather than moving immediately to creation of a task force and development of a basin-wide water management plan for several reasons. First, as noted in Section 1.3, in passing HB 397 the Legislature did not provide funding for this effort during until FY 2003. We are not aware of alternative funding sources to support development of a plan during FY 2002. Second, our experience has shown us that it is crucial to first build a common understanding among the participants of the issues and one another's interests and concerns. Third, based on the response to our questionnaire and interviews, there does not appear to be an issue compelling enough to warrant convening the task force at this time. This situation may change as we move forward, either as circumstances in the basin change, or as people learn more about the issues.

Also, as noted in Section 1, the Clark Fork River basin is large and encompasses many complex water-related issues, including court disputes between the State and the Confederated Salish and Kootenai Tribes over the ownership and regulation of water arising on or under and passing through tribal lands; disputes involving the regulation of Flathead Dam and Lake; endangered species recovery, both of species native to Montana and of anadromous salmonid species located in the downstream states; and controversy over Avista's hydropower water rights raised by the State during the relicensing of Avista's two Clark Fork River dams. As reported in Section 4.5, respondents identified a number of interests that should be involved in addressing these issues.

In the face of these challenges, we propose convening a series of educational forums, beginning July 2002 when funding becomes available, to build a common understanding of trends and issues in the basin. This would lay the necessary foundation for subsequently developing a basin water management plan. The forums would bring together people with diverse views and the best available information to allow an exchange of ideas and learning from one another. The forums could

also be used to identify common issues and develop strategies to address them.

To help shape the forums and provide leadership and direction, we further propose forming an inclusive, broad-based coordinating committee. This committee would develop agenda topics for meetings, identify and recruit credible presenters to discuss them, and oversee preparation of a report to the legislature on the forums. We would seek volunteers to serve on the coordinating committee with the proviso that as a group they represent the broad range of basin water interests, but as individuals they would not formally represent organizations or constituencies. Because the forums would provide education but not decisions, such formal representation is unnecessary.

5.2 Organize an Upper Flathead Watershed Council

As noted in Section 3.4.1, some form of watershed group exists in nearly every watershed within the Clark Fork River basin. A significant exception is the Flathead River basin above Flathead Lake. Interviews suggest that this absence is due largely to the lack of the state adjudication process in this area. People from this area said that an upper Flathead group of consumptive water rights holders (including municipal, agricultural, and industrial water users, and hydropower users—PPL and BPA) and a technical advisory group made up of agency representatives is needed to assemble and develop an understanding of the basic facts about water availability and usage in the upper Flathead. Given the resources available beginning in July 2002, the Consensus Council is willing to help organize such a group. We strongly recommend that it be open to all affected interests, including local government, fish, recreation, and environmental interests. An upper Flathead watershed council could boost the confidence of local water interests in participating in a Clark Fork basin water management planning effort.

6.0 Next Steps

This report was circulated to everyone on our Clark Fork basin contact list (see Appendix B). We welcome comments on the report and its recommendations both in writing and at a meeting we will convene on **Friday, March 15, 2-4 p.m., in Room 18 of the Castle Center, School of Law, at the University of Montana, Missoula.** At the meeting, we will (1) seek agreement on whether and when to convene the educational forums, including topics to be addressed; (2) seek agreement on whether to organize an upper Flathead watershed council; (3) consider other options for moving forward; and (4) discuss the budget for any potential activities.

Submit written comments by April 1, 2002, to the Montana Consensus Council, P.O. Box 200801, State Capitol, Helena, MT, 59620-0801, or email: mmckinney@state.mt.us.

6.1 Process Budget

According to the fiscal note prepared for HB 397, the estimated costs to carry out the provisions of the law total $78,750 per year, including:

- $32,000 – Facilitation
- $40,000 – Technical analysis and support
- $ 6,750 – Travel costs for participants

Appendix A:

2001 Montana Legislature

HOUSE BILL NO. 397

INTRODUCED BY V. JACKSON, ADAMS, BOOKOUT-REINICKE, BRANAE, D. BROWN, BRUEGGEMAN, CURTISS, DALE, DELL, DEPRATU, ELLIS, ERICKSON, LASLOVICH, LAWSON, OLSON, A. PETERSON, RIPLEY, SMITH, SOMERVILLE, TAYLOR, B. THOMAS, TROPILA

AN ACT ESTABLISHING THE CLARK FORK RIVER BASIN TASK FORCE; REQUIRING THE TASK FORCE TO DEVELOP A WATER MANAGEMENT PLAN FOR THE BASIN; REQUIRING THE TASK FORCE TO SUBMIT INTERIM REPORTS TO THE GOVERNOR AND THE LEGISLATURE; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO PROVIDE A WRITTEN NOTICE WHEN THE DEPARTMENT ISSUES WATER USE PERMITS IN THE CLARK FORK RIVER BASIN; SPECIFYING THE CONTENTS OF THE WRITTEN NOTICE; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Clark Fork River basin task force – water management plan. (1) The governor's office shall designate an appropriate entity to convene and coordinate a Clark Fork River basin task force to prepare a water management plan for the Clark Fork River basin pursuant to 85-1-203. The designated appropriate entity shall:

(a) identify the individuals and organizations, public, tribal, and private, that are interested in or affected by water management in the Clark Fork River basin;

(b) provide advice and assistance in selecting representatives to serve on the task force;

(c) develop, in consultation with the task force, appropriate opportunities for public participation in the development of a water management plan; and

(d) ensure that all watershed and viewpoints within the basin are adequately represented on the task force, including a representation from the following:

(i) the reach of the Clark Fork River in Montana below its confluence with the Flathead River;

(ii) the Flathead River basin, including Flathead Lake, from Flathead Lake to the confluence of the Flathead River and the Clark Fork River. At least one representative from this basin must be a representative of the Confederated Salish and Kootenai tribal government.

(iii) the Flathead River basin upstream from Flathead Lake;

(iv) the reach of the Clark Fork River between the confluence of the Blackfoot River and the Clark Fork River and the confluence of the Clark Fork River and the Flathead River;

(v) the Bitterroot River basin as defined in 85-2-344; and

(vi) the Upper Clark Fork River basin as defined in 85-2-335.

(2) The task force shall examine, for applicability to the water management plan, existing laws, rules, plans, and other provisions affecting water management in the Clark Fork River basin, including:

(a) the temporary closure of Bitterroot River subbasins pursuant to 85-2-344;

(b) the closure of the Upper Clark Fork River basin pursuant to 85-2-336;

© the restrictions on ground water development in the Upper Clark Fork River basin provided for in 85-2-337; and

(d) the Upper Clark Fork River basin management plan, adopted as a section of the state water plan pursuant to 85-1-203.

(3) The task force shall prepare a water management plan for the Clark Fork River basin pursuant to 85-1-203. The water management plan must identify options to protect the security of water rights and provide for the orderly development and conservation of water in the future.

(4) The task force shall submit an interim report annually by October 31 on its activities to the governor and the legislature.

(5) The water management plan, including the information prepared by the task force under this section, must be submitted to the 59th legislature, as provided in 85-1-203, by September 15, 2004.

Section 2. Notice to permit holders – Clark Fork River basin. The department shall provide a written notice to each person that receives a provisional water use permit to appropriate water within the Clark Fork River basin. The written notice must state: "This provisional water use permit has a priority date that is junior to the rights of senior water right holders in the Clark Fork River Basin. In accordance with Montana law, you may be subject to a call by senior water right holders, in which case you may be required to discontinue your use of water for the period of the call."

Section 3. Codification instruction. (1) [Section 1] is intended to be codified as an integral part of Title 85, and the provisions of Title 85 apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to [section 2].

Section 4. Notification to tribal government. The secretary of state shall send a copy of [this act] to the tribal government located on the Flathead Indian reservation.

Section 5. Effective date. [This act] is effective on passage and approval.

Section 6. Termination. [This act] terminates April 15, 2005.

- END -

Appendix B: List of People and Organizations Contacted

(Not all of these people and organizations responded)

Tribes

Confederated Salish and Kootenai Tribes

Watershed Groups

Blackfoot Challenge
Bitterroot Water Forum
Bull River Watershed Council
Elk Creek Watershed Council
Flathead Basin Commission
Flint Creek Watershed Group
Mineral County Watershed Group
Nevada Creek Watershed Group
Prospect Creek Watershed Council
Rock Creek Trust
Rock Creek Watershed Council
Tri-State Water Quality Council
Trout Creek/Little Trout Creek Watershed Council
Upper Clark Fork Steering Committee
White Pine Creek Watershed Council

Conservation Districts

Montana Association of Conservation Districts
Bitterroot Conservation District
Deer Lodge Valley Conservation District
Eastern Sanders County Conservation District
Flathead Conservation District
Granite County Conservation District
Green Mountain Conservation District
Lake County Conservation District
Lewis & Clark Conservation District
Lincoln Conservation District
Mile High Conservation District
Mineral County Conservation District
Missoula Conservation District
North Powell Conservation District

Environmental/Conservation Groups

Trout Unlimited
Rock Creek Alliance
Clark Fork Pend Oreille Coalition

Cities and Towns

City of Polson

Irrigation Districts

Flathead Joint Board of Control

State and Federal Agencies

Montana Department of Natural Resources and Conservation
Northwest Power Planning Council
USDA Forest Service
U.S. Environmental Protection Agency
U.S. Fish and Wildlife Service

Utilities

Avista Corporation
PP&L Montana

County Commissions

Anaconda Deer Lodge County
Butte Silver Bow County
Flathead County
Granite County
Lake County
Lincoln County
Mineral County
Missoula County
Powell County
Ravalli County
Sanders County

Chambers of Commerce

Anaconda
Bitterroot
Butte
Columbia Falls
Deer Lodge
Polson
Kalispell
Missoula
Philipsburg
Superior
Thompson Falls
Whitefish

Legislators

Rep. Darrel Adams
Rep. Ron Bitney
Rep. Sylvia Bookout-Reinicke
Rep. Dee L. Brown
Rep. John Brueggeman
Rep. Rosalie Buzzas
Rep Gilda Clancy
Rep. Paul Clark
Rep. Larry Cyr
Rep. Ron Erickson
Rep. Tom Facey
Rep. Stanley M. Fisher
Rep. Nancy Rice Fritz
Rep. Steven Gallus
Rep. Gail Gutsche
Rep. Dick Haines
Rep. Verdell Jackson
Rep. Joey Jayne
Rep. Jim Keane
Rep. Rick Laible
Rep. Jesse Laslovich
Rep. Bob Lawson
Rep. Doug Mood
Rep. Brad Newman
Rep. Holly Raser
Rep. Allen Rome
Rep. Jim Shockley
Rep. Roger Somerville
Rep. Butch T. Waddill
Rep. Allan Walters
Rep. David E. Wanzenreid
Sen. Tom Beck
Sen. Dorothy Berry
Sen. Vicki Cocchiarella
Sen. Bob Depratu
Sen. Jon Ellingson
Sen. Jim Elliott
Sen. Mike Halligan
Sen. Dan Harrington
Sen. Bob Keenan
Sen. Dale Mahlum
Sen. Bea McCarthy
Sen. Arnie A. Mohl
Sen. Jerry O'Neil
Sen. Debbie Shea
Sen. Mike Taylor
Sen. Fred Thomas

News Media

Anaconda Leader
Bigfork Eagle
Bitterroot Star
Daily Inter Lake
Headwaters News
Hungry Horse News
Lolo Peak News
Missoula Independent
Missoulian
Montana Standard
Philipsburg Mail
Sanders County Ledger
Seeley Swan Pathfinder
Silver State Post
Whitefish Pilot

Appendix C:
Map of the Clark Fork River Basin

Appendix D:
Number and Geographic Distribution of Upper Clark Fork River Basin Water Rights Junior to Avista's Noxon Rapids Hydropower Rights[1]

Basin	Total Junior Uses	Junior Municipal Uses	Junior Irrigation Uses	Junior Irrigation Uses >5cfs
Lower Clark Fork (76N)	573	192	196	0
Middle Clark Fork (76M)	593	74	304	8
Sub-basin Total	1,166(15%)	266	500	8
Lower Flathead (76L)	493	108	211	15
Flathead (76LJ)	2,977(38%)	1,498	1,103	26
Swan River (76K)	440	201	1	0
So. Fork Flathead (76J)	29	13	1	0
Mid. Fork Flathead (76I)	41	25	6	0
Sub-basin Total	3,980(51%)	1,845	1,491	41
Bitterroot River (76H)	1,319(17%)	84	650	11
Blackfoot River (76F)	750	246	196	40
Rock Creek (76E)	91	27	29	2
Flint Creek (76GJ)	74	16	32	4
Upper Clark Fork (76G)	425	34	235	43
Sub-basin Total	1,340(17%)	323	492	89
Clark Fork Basin Total	**7,805(100%)**	**2,518(32%)**	**3,133(40%)**	**149(2%)**

[1]Derived from Montana's centralized water right records system as displayed during a June 3, 1998, meeting, as the table of "Uses of Surface Water in MT's Clark Fork River Basin" (June 2, 1998), and "Clark Fork Basin Water Rights Great than 5 cfs and Junior to Noxon Rapids Dam – Sorted by Basin by Priority" (June 2, 1998).

Appendix E:
Recent Clark Fork River Basin Water-Related Studies

An Analysis of the Effect of Timber Harvest on Streamflow Quantity and Regime: An Examination of Historical Records. Hauer, F. Richard. Kalispell, MT: Flathead Basin Commission, 1991.

Blackfoot River Groundwater Detection Infrared Study, Pierce, R. C. (Ronald C.) and Peters, Don. Montana Dept. of Fish, Wildlife and Parks, Region 2, 1992.

Clark Fork Basin Project Status Report and Action Plan. Johnson, Howard E. Helena, Montana: Clark Fork Basin Project, Office of the Governor, 1988.

Clark Fork Basin Studies: Effects of Future Irrigation Development on Hydroelectric Generation in the Basin. Bureau of Reclamation. Boise, Idaho: December 1988.

Economic Value of Instream Flow in Montana's Big Hole and Bitterroot Rivers [microform], Duffield, John, Brown, Thomas C., Allen, Stewart D. Allen. Fort Collins, Colo. U.S. Dept. of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station, 1994

Effects of Future Irrigation Development on Hydroelectric Generation in the Clark Fork River Basin. Final Project Report. Cunningham, A.B., Bultsma, M.L., and Boyce, R.D. Dept. of Civil and Agricultural Engineering, MSU. Bozeman, Montana: Nov.1, 1988.

Final Environmental Impact Statement: Cabinet Gorge and Noxon Rapids Hydroelectric Projects, Idaho and Montana. Federal Energy Regulatory Commission, Office of Hydropower Licensing. Washington, DC. February 2000.

Flint Creek Return Flow Study. Montana Dept. of Natural Resources & Conservation & Montana Bureau of Mines and Geology. Open-File Report 364. December 1997.

Impacts of a Proposed Coal Mine in the Flathead River Basin. International Joint Commission, Ottawa: The International Joint Commission. 1998.

Investigation of Water Availability for Clark Fork Basin above Noxon Rapids Dam. Report. Holnbeck, Stephen R. Water Management Bureau, DNRC. Helena, Montana: 1988.

North Fork Blackfoot River Hydrologic Study. Roberts, Mike and Waren, Kirk. Montana Dept. of Natural Resources and Conservation. DNRC Report WR-3.C.2.NFB. Helena, Montana: March 2001.

A Proposal to Resolve Current and Future Water Allocation Issues Associated With Avista Corporation's Hydropower Developments and Current And Future Water Uses In The Clark Fork Of The Columbia River Drainage. Briefing Paper. McLane, Mike. DNRC. Helena, MT 1999.

Subbasin Planning 101 – Overview of the process. Northwest Power Planning Council. www.nwcouncil.org/fw/subbasinplanning/101.htm.

Subbasin Planning Overview. Northwest Power Planning Council. www.nwcouncil.org/fw/subbasinplanning/overview.

Subbasin Summaries: Mountain Columbia. NWPPC. March 16, 2001. www.cbfwa.org/files/province/mtncol/subsum.htm.

Summary Notes of Public Meetings on the Avista – State Negotiations for FERC Relicensing: Bitterroot Basin Closure, September 1999, Upper Clark Fork, December 1999. Flathead, January 2000. Lower Clark Fork, February 2000. McLane, Mike. MT Dept. of Natural Resources and Conservation. Helena, MT: 2000.

Technical Guide for Subbasin Planners. Northwest Power Planning Council. Council Document 2001-20.

Tribal Rights, Water Rights, and the Role of Fish and Wildlife Agencies. Columbia River Basin Fish and Wildlife Program: A Multi-Species Approach for Decision Making. Northwest Power Planning Council Document 2000-19.

Upper Clark Fork Basin Water Reservation Applications: Final Environmental Impact Statement. MT Dept. of Natural Resources and Conservation. Helena, MT: 1991.

Upper Clark Fork River Basin Water Management Plan. Upper Clark Fork River Basin Steering Committee. Montana. 1994.